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Supreme Court of the United States

October Term, 1947
No. 409

GEORGE E. EDDY and SAMUEL SILBIGER,

Petitioners,

against

LULU R. KELBY, as Executrix of the Last Will and Testament of CHARLES H. KELBY, Deceased, GEORGE C. WILDERMUTH, CHARLES M. McCARTY, PRUDENCE-BONDS CORPORATION AND RECONSTRUCTION FINANCE CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

SAMUEL SILBIGER,
Counsel for Petitioner and pro se.

SUPREME PRINTING CO., INC., 41 MURRAY STREET, N. Y., BARCLAY 7-0349
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

To the Honorable, The Supreme Court of the United States:

George E. Eddy and Samuel Silbiger pray that a writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit made in the above-entitled proceeding, which affirmed the decree of the District Court awarding allowances to counsel for services. Said judgment was by a divided Court, Hon. Jerome N. Frank, dissenting.

Opinions Below

The opinion of the Circuit Court of Appeals and the dissenting opinion are reported in 163 F. 2d 56 and 59.

Jurisdiction

The judgment of affirmance was entered in the Circuit Court of Appeals on July 22nd, 1947.

The jurisdiction of the Court to review the decision of the Circuit Court of Appeals is invoked under Section 240 (a) of the Judicial Code, as amended by Act of Congress of February 13, 1925 (U. S. Code Title 28, Section 347).

Questions Presented

1. Has the petitioner, Samuel Silbiger, been unjustly discriminated against in the awarding of counsel fees for services rendered?

2. Did the Circuit Court of Appeals err in neglecting to apply the rule that the failure by appellants to assign an error, or the failure to urge and argue an alleged error constitutes a waiver by them of that claim?

3. Did the Circuit Court err in denying to petitioner, Samuel Silbiger the sole credit for preserving and recovering for beneficiaries of a trust estate, interest on the sums with which the trustee's accounts were surcharged, and which interest amounted to $483,603.52?

Statement

Prudence Bonds Corporation filed its petition for reorganization on June 29th, 1934. Charles H. Kelby and Clifford S. Kelsey were duly appointed and qualified as Trustees of the Debtor. In due course the Debtor was adjudged insolvent, and plans of reorganization of the Eighteen Series of Prudence Bonds were accepted and confirmed.

By such plans the rights and claims of bondholders against the indenture trustees for any violation of the Trust Indentures, were specifically preserved; and the plans provided for the creation of a new corporation, in which the bondholders were the beneficial owners of the capital stock; for an extension of the maturity of the bonds; for a change of the interest provisions; and for the servicing of the collateral by the New Corporation. (*Central Hanover Bank* v. *President etc. of the Manhattan Company,* 105 F. 2d 130.)

The City Bank Farmers Trust Company became the successor trustee under a Supplemental Trust Agreement for each of the Eighteen series of Prudence Bonds. Such Supplemental Trust Agreements contained no modification of the rights or claims of the bondholders against the original Indenture Trustees, and the Successor Trustee assumed no responsibility for the acts or omissions of its predecessors, and was specifically exempted from any duty to institute any legal or equitable actions therefor against its said predecessors (95).*

The reorganization trustees were authorized and directed to assign all their right, title and interest in the Trust Fund

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* Figures in parenthesis refer to pages of Appendix to Eddy's brief.

collateral securing the Eighteen series of bonds to the New Corporation created pursuant to the plans; and the Corporate Trustees of the respective Trust Funds were authorized to transfer and deliver such funds to their successor, City Bank Farmers Trust Company, and to account for their acts and proceedings and to apply herein for a judicial settlement of their accounts (73, 92).

Charles H. Kelby and Clifford S. Kelsey as Trustees of the Debtor, duly assigned all their right, title and interest in the respective trust funds to the New Corporation by assignment dated March 1st, 1938 (5th Series R. 500).* The respective corporate trustees filed their accounts herein and prayed for a judicial settlement thereof.

Among the accounts were those filed about September 1938 by President and Directors of the Manhattan Company as the trustee respectively of the Fifth and Ninth Series of Prudence Bonds.

Issue was duly joined by the joint objections to such accounts filed by the New Corporation and the Reorganization Trustees; by the objections of bondholders represented by Joseph Nemerov, Esq.; and the objections of petitioner George E. Eddy, a bondholder represented by petitioner Samuel Silbiger. All three sets of objections were filed on the same day, October 2, 1939.

After trial of the issues before Special Master James G. Moore, Esq. he reported and recommended that the President and Directors of the Manhattan Company be surcharged with $1,065,565 as trustee in the Fifth Series and with $148,199.99 in the Ninth Series, and that the objections

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* Refers to Record on Appeal 147 F. 2d 465.

of petitioner Eddy in the Ninth Series be dismissed (80, 136). Separate objections to said reports were filed by petitioner Eddy, and joint objections by the New Corporation, the Trustee of the Debtor and others. Both sets of objections specifically excepted to the failure of the Special Master to recommend that said trustee be also surcharged with interest (60). Petitioner Silbiger alone, however, urged and stressed the point before the District Judge (60, 232). The District Judge overruled all exceptions to the Special Master's reports. A separate appeal to the Circuit Court was taken by petitioner Eddy and a joint appeal by the New Corporation and the Trustee of the Debtor. On said appeals the separate brief of petitioner Silbiger, as attorney for petitioner Eddy, alone assigned as error the failure to charge the bank with interest (60, 233). The joint brief of the New Corporation in the Circuit Court did not urge or contend that the failure to charge interest constituted error (233).

On the said appeal *of petitioner Eddy,* the decrees of the District Court were modified, and on the Circuit Court's Mandate to charge the bank with interest, the District Judge fixed the rate of interest at 3% (81) and thereby an additional sum of $425,617.72 was recovered for the Trust Fund in the Fifth Series and $57,985.80 in the Ninth Series, a total increase for both series of $483,603.52 (84).

The applications of the bank to this Court for writs of certiorari were denied, 319 U. S. 757 (84). Judge Kelby passed away on May 31, 1944 and he did not participate in the appeals to the Circuit Court, nor in the opposition in this Court to the bank's petitions for writs of certiorari (243).

As a result of the said decisions, President and Directors of the Manhattan Company on May 16, 1945 paid into the Fifth Series Trust Fund the sum of $1,572,991.93 and in the Ninth Series $208,132.16.

Thereafter the attorneys for the several parties applied to the District Court for allowances and the sums requested and awarded were as follows:

Applicant	*Requested*	*Awarded*
Estate of Charles H. Kelby, Deceased, Trustee of Debtor	$ 90,000.00	$60,000.00
Samuel Silbiger, Attorney for George E. Eddy	200,000.00	40,000.00
Charles M. McCarty, Attorney for Prudence Bonds Corporation	35,000.00	35,000.00
Joseph Nemerov, Attorney for Hilda S. Riese, *et al.*, ...	110,000.00	30,000.00
Prudence Bonds Corporation (expenses)	12,483.88	12,483.88
Prudence Realization Corporation (expenses)	749.73	749.73

Petitioners appealed by permission of the Circuit Court from the allowances to the Estate of Charles H. Kelby, George C. Wildermuth, Charles M. McCarty and Samuel Silbiger.

The Circuit Court recognized that the services rendered by the respective attorneys in the cases of *Central Hanover Bank and Trust Co.* v. *President etc. of the Manhattan Company,* 105 F. 2d 130; *Manufacturers Trust Co.* v. *Kelby,*

125 F. 2d 650; *Brooklyn Trust Co.* v. *Kelby,* 134 F. 2d 105; *President & Directors of the Manhattan Co.* v. *Kelby,* 147 F. 2d 465, were important factors in evaluating the services of counsel. In the *Central Hanover* case, which laid the foundation on which the ultimate results were achieved, the late Charles H. Kelby, George C. Wildermuth, Esq., and Joseph Nemerov, Esq., did not represent any party or participate and take any part (238). In *Manufacturers Trust Co.* v. *Kelby,* the late Charles H. Kelby performed no legal services and was represented by George C. Wildermuth, Esq. (238-239); in the case of President & Directors of the Manhattan Co., the late Charles H. Kelby did not participate in the appeal to the Circuit Court (241), nor did he render any service in connection with the petitions made to this Court by Manufacturers Trust Company and President and Directors of the Manhattan Company for writs of certiorari (239, 241).

The unanimous opinions of the Circuit Court in the cases of *Brooklyn Trust Co.* v. *Kelby,* 125 F. 2d 650 and *President & Directors of the Manhattan Company* v. *Kelby,* 147 F. 2d 465 were wrtten by Hon. Jerome N. Frank. Although he was undoubtedly best qualified to evaluate the services rendered by the respective counsel in the important phases of the litigation in the Circuit Court, his opinion as to the value of petitioner Silbiger's services was not accepted.

Specification of Errors

1. The Circuit Court of Appeals erred in denying to petitioner Silbiger the sole credit for increasing the recoveries herein by the items of interest aggregating $483,603.52.

2. The Circuit Court of Appeals erred in deciding that the New Corporation and the Trustees of the Debtor preserved the rights of the bondholders as to the claim for interest.

3. The Circuit Court of Appeals erred in failing to decide that the bondholders are the sole beneficiaries of the respective trust estates and the only real parties in interest.

4. The Circuit Court of Appeals erred in affirming the decisions of the District Court whereby $115,000.00 out of a total award of $185,000.00 for counsel fees, was allowed to counsel who did not represent any real parties in interest, and to be paid out of funds belonging to petitioner Eddy and other bondholders.

5. The Circuit Court of Appeals erred in arbitrarily disregarding the uncontradicted expert testimony of Hon. Charles H. Tuttle in so far as such testimony is consistent with usage and precedent and is reasonable.

6. The Circuit Court of Appeals erred in deciding that the award of $40,000.00 to petitioner Silbiger is adequate compensation for the services rendered by him.

Reasons for Granting the Writ

The Circuit Court of Appeals predicated its judgment upon its decision that the rights of the bondholders was preserved by counsel for the New Corporation and the Trustees of the Debtor, although said counsel neither assigned as error the failure of the Court below to award interest, nor urged or discussed such claim in their brief. Such decision ignores Rule 19 of the Circuit Court which reads:

> "(a) The brief for appellant shall contain in the order stated
>
> (1) A concise abstract or statement of the case, presenting succinctly the questions involved, the manner in which they are raised, *and the errors claimed*; * * *." (Emphasis supplied.)

The decision of the Circuit Court in that respect is in conflict with the decisions of this Court in *Southeastern Express Co.* v. *Robertson,* 264 U. S. 541, *Yesionowski* v. *Boston & Maine R. R. Co.,* 329 U. S. 452; and conflicts with the decisions of the Circuit Court of Appeals in other circuits. See *McNamara* v. *Hart,* 83 F. (2d) 649 (C. C. A. 8); *Jackson* v. *Fuller,* 85 F. (2d) 816 (App. D. C.); *American Ins. Co.* v. *Scheuffler,* 129 F. 2d 143 (C. C. A. 8), cert. denied 317 U. S. 687; *Schroepfer* v. *A. S. Abell Co.,* 138 F. 2d 111 (C. C. A. 4) cert. denied 321 U. S. 763.

The decision of the Circuit Court in so far as there is implicit therein a determination of the status of parties to file objections to a trustee's account, is in conflict with applicable decisions of the Courts of New York State. See, *Hart* v. *Goadby,* 138 App. Div. 160; 123 N. Y. S. 166.

Also, the decision of the Circuit Court insofar as it affirms the decision of the District Court and sustains the award of counsel fees to counsel for parties who are not "*jointly* interested with others in a *common* fund" conflicts with equitable principles and the rule established by this Court in *Trustees* v. *Greenough*, 105 U. S. 527 and *Central R. R. Co.* v. *Pettus*, 113 U. S. 116.

In the interests of equity and justice the decision of the Circuit Court of Appeals for the Second Circuit should be reviewed by this Court.

WHEREFORE, your petitioners respectfully request that a Writ of Certiorari be granted as prayed.

GEORGE E. EDDY,
SAMUEL SILBIGER,
Petitioners.

STATE OF NEW YORK, }
COUNTY OF KINGS, } ss.:

SAMUEL SILBIGER, one of the petitioners herein, being duly sworn, says that he has read and knows the contents of the within petition and the same is true in all respects as he verily believes.

SAMUEL SILBIGER.

Sworn to before me this
18th day of October, 1947.

FRANCES WITOFF
Notary Public in the State of New York
Residing in Kings County
Kings Co. Clk's No. 129, Reg. No. 312-W-8
Commission Expires March 30, 1948

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Respondents.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I

The Denial of the sole credit to petitioner Silbiger for the recoveries of the items of interest aggregating $483,603.52 is unjust and constitutes reversible error.

The increase of the judgments in the aggregate sum of $483,603.52 resulted from the appeals taken to the Circuit Court in the case of *President and Directors of the Manhattan Company* v. *Kelby,* 147 F. 2d 465. The decision was unanimous and on the question of interest stated:

> "Appellee Eddy urges that the Court and Master erred in not surcharging the bank with interest on each improper withdrawal from the date thereof.* We think it should be so charged."

In a footnote as indicated after the word "thereof" the Court said:

> "Exceptions to the Master's report on that ground were filed in the Court below."

The language of this opinion is clear and unequivocal and not subject to dual interpretation. The opinion was written by Hon. Jerome N. Frank, and assuming that it was ambiguous and capable of more than one construction, no-one was better qualified to resolve the ambiguity, and state the true intent than the Judge who expressed the opinion of the Court. He states in his instant dissenting opinion, "it is clear that, had it not been for Silbiger's brief on the appeal in *Bank of Manhattan* v. *Kelby, supra,* there would have been no recovery of interest."

Neither of the two Judges who concurred in the majority opinion sought to be reviewed sat or participated in the said *Bank of Manhattan* v. *Kelby* case, yet they rejected this interpretation of their colleague, and sought to justify their affirmance of the decree of the District Court by a ruling that with respect to the question of interest, "the other parties seem to have preserved their rights". Such ruling is not supported by any established precedents, and as pointed out in the dissenting opinion of Judge Frank, is contrary to controlling authorities.

It is undisputed that the joint brief of Messrs. McCarty, Wildermuth and Nemerov did not claim that the failure to award interest constituted error, as is necessary under Rule 19 of the Circuit Court of Appeals for the Second Circuit, nor did they urge or argue the claim in their brief. Clearly therefore they waived and abandoned said claim, and by no fair judgment are they entitled to any credit for obtaining for the bondholders such additional sum of $483,603.52.

Southeastern Express Co. v. *Robertson,* 264 U. S. 541;

Yesionowski v. *Boston & Maine R.R. Co.*, 329 U. S. 452;
McNamara v. *Hart*, 83 F. 2d 649 (C. C. A. 8);
Jackson v. *Fuller*, 85 F. 2d 816 (App. D. C.);
Loomis v. *Wattles*, 266 Fed. 876.

In the case last cited, at page 878, the Court said:

> "The assignment of error relating to the allowance of interest is not argued, and will be deemed abandoned."

The denial, therefore, of sole credit to petitioner Silbiger for obtaining the additional sum of $483,603.52 for the benefit of the Fifth and Ninth Series Trust Fund, is a material error of law; the premise upon which the District Court predicated the awards to respective counsel and upon which the majority opinion of the Circuit Court affirmed the same, is false, and the conclusion based on such false premise is necessarily erroneous, and prejudicial to petitioner Silbiger.

II

The Bondholders are the sole beneficiaries of the Trust Estates and the only real parties in interest. Petitioner Silbiger represented bondholders and the allowance awarded him is inadequate, unjust and disproportionately small as compared to the awards made to counsel who represented no party in interest.

The various stages of the litigation, extending over a period of approximately seven years involved several milestones through the District Court, the Circuit Court of Appeals and in this Court over the difficult road to ultimate success, and whether the several counsel to whom allowances were awarded participated therein, are as follows:

Title of Proceedings	*Silbiger*	*Kelby*	*Wilder-muth*	*Nemerov*	*Mc-Carty*
Litigation on jurisdictional Question — Central Hanover Bank & Trust Co. v. President and Directors of the Manhattan Co., 105 F. 2d 130	Yes	No	No	No	Yes
*Preparations for and Trial of Third Series	Yes	No	Yes	Yes	Yes
Litigation in re: Manufacturers Trust Co. v. Kelby, 125 F. 2d 650	Yes	No	Yes	Yes	Yes
Opposition to Application for Writ of Certiorari which was denied in 316 U. S. 697	Yes	No	Yes	Yes	Yes
Litigation in re: Brooklyn Trust Company v. Kelby, 134 F. 2d 105	Yes	Yes	No	Yes	Yes
Opposition to Application for Writ of Certiorari which was denied in 319 U. S. 767	Yes	Yes	No	Yes	Yes
Trial of Fifth and Ninth Series	Yes	Yes	No	Yes	Yes
Appeal—President & Directors of Manhattan Company v. Kelby, 147 F. 2d 465	Yes	No	Yes	Yes	Yes
Instrumental on said appeal in obtaining modifications on question of interest resulting in increase of $483,603.52 on recovery	Yes	No	No	No	No
Opposition to Application for Writ of Certiorari which was denied. 324 U. S. 866	Yes	No	Yes	Yes	Yes

* I have included this milestone in fairness to Mr. Wildermuth because the Third Series accounting was the first to be tried, and although compromised and settled before adjudication, it formed the norm or pattern for the subsequent trials of all other series including the instant cases. Mr. Wildermuth conducted the trial of said Third Series by agreement made with Mr. Silbiger (Rec., *Manufacturers Trust Co.* v. *Kelby,* 125 F. 2d 650, p. 234, f. 702).

An examination of the Special Master's report herein, read in the light of the established facts as to the participation of respective counsel in the various proceedings that led to the enrichment of the bondholders, clearly discloses the unfair discrimination made against petitioner Silbiger in his appraisal of the relative value of the services rendered.

The only attorney, the value of whose services was determined by him to be dependent upon the *time necessarily consumed* to these proceedings was petitioner Silbiger. To justify the allocation of the largest proportionate fee to Judge Kelby's estate he erroneously reported that Judge Kelby "rendered services in connection with every phase of the litigation which resulted in the recoveries in the Fifth and Ninth Series," although Judge Kelby had no part in the *Central Hanover* case, the issues in which the Special Master himself characterized as "important" and "crucial" and which laid the solid foundation for the subsequent recoveries herein. The fact is that Judge Kelby did not participate in seven out of ten important and critical stages or phases of the litigation, including three appeals to the Circuit Court of Appeals, and the opposition to petitions for two writs of certiorari in this Court.

The Special Master placed an unwarranted construction on the language of the Court in *Manufacturer's Trust Company* v. *Kelby*, 125 F. 650 wherein it stated:

> "Finally, although we cannot quite see any reason for allowing the reorganization trustees to intervene, the matter was one for the decision of the district judge within the discretion vested in him by Rule 24(b)(2). The only practical considerations against their intervention are the danger of confu-

> sion arising from the presence of too many parties, and the possible increases in the allowances and costs. We cannot see why there should be any undue confusion, if the objectors continue in a single brief as they have on this appeal, and the district court will no doubt see to it that no unnecessary legal services are rewarded."

This language was construed by the Special Master as particularly applicable to petitioner Eddy, whom he deemed an intervenor, and as constituting the reorganization trustees and the New Corporation as the real parties in interest, and it was on such misinterpretation that he made his recommendations of the allowances to the respective counsel, which was confirmed by the District Court and affirmed below by the majority of the Circuit Court, one judge dissenting.

But the facts are just the reverse. The only interested parties are the bondholders. By the plan of reorganization herein the rights of the bondholders were not assigned to the New Corporation and nowhere in the record can the New Corporation point to any such assignment, nor did the Special Master make any finding that such assignment was ever made. He did find that the New Corporation succeeded to all the right, title and interest of the Debtor, and that it was authorized "to take over and perform the servicing of the collateral underlying the eighteen series of bonds."

The Circuit Court in the *Central Hanover* case interpreted the Plans of Reorganization of the Debtor and found with respect to the eighteen trust funds or "pools".

> "There was no equity in any of the pools, and the debtor had no free assets; nor did the new com-

pany, except for its right to 'service' the bonds * * *."

The right to service the collateral did not confer any title and cannot be construed as an assignment or transfer of the collateral. The title to such collateral was not vested in the New Corporation, but in City Bank Farmers Trust Company as the successor trustee in all eighteen series of bonds. The right of the New Corporation to "service" the collateral was an agency right created under the power of attorney conferred upon it by the terms of the Supplemental Trust Indenture. It acquired no interest in the collateral and it never became a real party in interest with respect to the claims of the bondholders against the Indenture Trustees in the instant case.

It is the established rule in the Federal Courts that an action is maintainable only by real parties in interest. Rule 17 of the Federal Rules of Civil Procedure provides:

> "Rule 17. *Parties Plaintiff and Defendant; Capacity.* (a) *Real Party in Interest.* Every action shall be prosecuted in the name of the real party in interest; * * *."

A similar rule prevails in New York State. Sec. 210 of the New York Civil Practice Act reads:

> "§210. *Action to be brought in name of real party in interest.* Every action must be prosecuted in the name of the real party in interest, * * *."

See:

Spencer v. *Standard Chemical and Metals Corporation*, 237 N. Y. 479;
Titus v. *Wallick*, 306 U. S. 282.

Likewise, in a derivative or representative action, such as the assertion of the bondholders' claims in the instant cases against the accounting trustees, the party asserting the claims and maintaining the action must establish not only that numerous parties have a common or general interest, but that the one asserting the claims is united in interest with the numerous parties he purports to represent. This is the settled rule and practice in the Federal Courts, and also is the law in New York State.

Rule 23a(1) Federal Rules of Civil Procedure;*
Sec. 195 New York Civil Practice Act;**
Clark v. *Chase National Bank of City of New York*, 45 Fed. Supp. 820;
Brenner v. *Title Guarantee & Trust Co.*, 276 N. Y. 230, at 235, 236;
Kahn v. *New York Life Ins. Co.*, 184 Misc. 417, 53 N. Y. S. 2d 575;
Meyer v. *Lowry*, 257 App. Div. 81; 12 N. Y. S. 2d 177.

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* "Rule 23 Class Actions.

(a) *Representation.* If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is (1) joint, or common, or secondary in the sense that the owner of the primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;".

** §195. *Suing for benefits of others*: Where the question is one of a common or general interest of many persons or where the persons who might be made parties are very numerous and it may be impracticable to bring them all before the Court, one or more may sue or defend for the benefit of all.

Manifestly therefore, since neither the New Corporation nor the Reorganization Trustees held any of the bonds secured by the several trust funds, neither was a real party in interest; neither had any legal status or capacity to sue on behalf of the bondholders—and the rights of the bondholders were not preserved by reason of their participation in the accounting proceedings. The principal parties to the litigation, entitled to the status of "domini liti" were the bondholders. By treating petitioner Eddy as an "intervenor" and not as representative of the real parties in interest, the awards of counsel fees by the District Court were predicated on an erroneous theory of the law, and the awards so made and confirmed by the divided Circuit Court of Appeals are obviously inequitable and unjust to petitioner Silbiger.

The proper equitable rule application in the instant case is that enunciated by this Court in *Trustee* v. *Greenough*, 105 U. S. 527, in the following language:

> "One *jointly interested* with others in a *common fund* who, in good faith maintains necessary litigation to save it from waste, and secure its proper application, is entitled in equity to the reimbursement of his costs, as between solicitor and client, either out of the fund itself or by proportionate contribution from those who receive the benefit of the litigation." (Italics supplied.)

See also:

Hobbs v. *McLean*, 117 U. S. 567;
Central R. R. Co. v. *Pettus*, 113 U. S. 116.

III

The Court below erred in totally disregarding the uncontradicted expert testimony of Hon. Charles H. Tuttle in so far as such testimony is consistent with usage and precedent and is reasonable.

The majority opinion below laid stress on the view of the "well known counsel for the defeated bank" and accepted his opinion at par in so far as it related to the compensation of Mr. McCarty, the attorney for the New Corporation--but totally rejected the view of the same counsel in so far as he stated in his affidavit "Practically the entire case was presented to the Special Master in the form of Stipulations (279) and that Mr. Silbiger "was the only attorney for the objectants who had the effrontery seriously to present such an argument" (as to the interest).

Also the majority opinion was greatly influenced by what it erroneously assumed were *disinterested* opinions of the Reconstruction Finance Corporation.*

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* The Circuit Court misapprehended the relation of Reconstruction Finance Corporation to these proceedings. The Board of Directors of the New Corporation is weighted down by former officers and directors of the Debtor and of the Prudence Company Inc. the guarantor of the Debtor's Bonds (R. 147 F. 2d 465, 613-624) together with Jerome Thralls, Special Representative of Reconstruction Finance Corporation (R. 147 F. 2d 465 at p. 618). Reconstruction Finance Corporation became the sole owner of all the capital stock of the Prudence Co. Inc. and under the reorganization of that company became the largest single stockholder of its successor Prudence Realization Corporation, which now holds $1,910,300, of the Subordinated bonds in the respective eighteen series; $67,200 of which are 5th Series and $105,700 are Ninth Series Bonds. In a companion case, now awaiting decision of the Circuit Court, Prudence Realization Corporation is asserting a right to payment of such bonds although the deficiency in the payment of the interest on the priority publicly held bonds at the guaranteed rate as of August 1st, 1945, is $411,783.18 in the 5th Series and $604,606.17 in the Ninth Series.

However, it totally disregarded, without comment, the expert testimony of Hon. Charles H. Tuttle to the effect that the reasonable value of Mr. Silbiger's services was $220,000 (407). In so doing it deviated from the rule laid down by this Court in *Head* v. *Hargrave*, 105 U. S. 45 wherein it stated:

> "The evidence of experts as to the value of professional services does not differ in principle from such evidence as to the value of labor in other departments of business, or the value of property,*** and while great weight should be given to the opinion of those familiar with the subject, they are not to be blindly received, but are to be intelligently examined by the jury in the light of their own general knowledge; they should control only as they are found to be reasonable."

Mr. Tuttle's opinion was predicated on long experience at the bar and he supported his opinion by a series of precedents set forth in Silbiger's Exhibit 13, being an extract from an article on counsel fees, by George D. Hornstein in Columbia Law Review, Vol. 39, 1939 at page 784.

Mr. Tuttle testified that in his opinion a reasonable percentage of any recoveries that should be awarded counsel as compensation for services rendered on a contingent basis is between 18-2/3% and 45% and that in the instant cases 25% was fair and reasonable and in accordance with the precedents established by the Courts (426).

The testimony of Mr. Tuttle was reasonable; it was that of a disinterested witness, and in the absence of contradiction should have been weighed by the Court and accepted as controlling to the extent that the Court was able to find it reasonable.

Conclusion

The fees awarded to respective counsel throughout these proceedings are completely broken down in the appendix to Eddy's Brief, pages 21 to 23. In the light of the interests represented respectively by counsel and the necessity for the rendition of services only by counsel for the real parties in interest—a perusal of the allowances heretofore made* and those now sought to be reviewed clearly indicates the unfair discrimination against petitioner Silbiger, and amply justifies the unusually strong statement in the dissenting opinion below that "Silbiger has been shockingly underpaid". The writ prayed should be granted.

Dated: October 18th, 1947.

SAMUEL SILBIGER,
Counsel for Petitioner and pro se.

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* In the October Term, 1942 of this Court, the petitioners applied for a writ of certiorari to the Second Circuit to review the allowances made in connection with Series A. A., Third, Fourth, Seventh and Seventeenth (21) after the Circuit Court denied them leave to appeal and dismissed the appeal taken by them as of right. This Court denied the writ, 319 U. S. 755.

FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1947

No. 369

GEORGE E. EBOY and SAMUEL SHERMAN,
Petitioners,

against

LULU R. KELBY, as Executrix of the Last Will and Testament of Charles H. Kelby, Deceased, GEORGE C. WILDERMUTH, CHARLES M. McCARTY, PRUDENCE-BONDS CORPORATION and RECONSTRUCTION FINANCE CORPORATION,
Respondents.

BRIEF OF RESPONDENTS LULU R. KELBY, AS EXECUTRIX, ETC., GEORGE C. WILDERMUTH, CHARLES M. McCARTY AND PRUDENCE-BONDS CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CHARLES M. McCARTY,
Counsel for Prudence-Bonds Corporation (New Corporation) and Pro Se.

GEORGE C. WILDERMUTH,
Counsel for Lulu R. Kelby, as Executrix of the Last Will and Testament of Charles H. Kelby, deceased, and Pro Se.

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Supreme Court of the United States

OCTOBER TERM, 1947

No. 409

GEORGE E. EDDY and SAMUEL SILBIGER,
Petitioners,

against

LULU R. KELBY, as Executrix of the Last Will and Testament of Charles H. Kelby, Deceased, GEORGE C. WILDERMUTH, CHARLES M. McCARTY, PRUDENCE-BONDS CORPORATION and RECONSTRUCTION FINANCE CORPORATION,
Respondents.

BRIEF OF RESPONDENTS LULU R. KELBY, AS EXECUTRIX, ETC., GEORGE C. WILDERMUTH, CHARLES M. McCARTY AND PRUDENCE-BONDS CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinions Below

The Report of the Special Master (R. 34 *) and the opinion of the District Court (R. 67) are not reported. The opinions of the Circuit Court of Appeals for the Second Circuit (R. 460, 465) are reported in 163 F. 2d 56, 59.

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* The references containing the letter "R." are to the pages of a printed appendix to the petitioners' brief in the Circuit Court of Appeals. As we show in Point II, *infra*, the petitioners have not served or filed the record in the case as required by the Rules of this Court.

Jurisdiction

The order of the Circuit Court of Appeals was entered on July 22, 1947 (R. 467). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (U. S. Code, Title 28, Section 347). Although this is a bankruptcy case, the petitioners do not invoke the jurisdiction of this Court under Section 24c of the Bankruptcy Act.

Statement

The order sought to be reviewed affirmed an order awarding allowances for services rendered and expenses incurred in connection with two certain accountings had in the bankruptcy court to carry out Plans of Reorganization confirmed in the proceeding for reorganization of Prudence-Bonds Corporation, Debtor, under Section 77B of the Bankruptcy Act (R. 27). Petitioner Eddy, holder of $3,000 of bonds (R. 55-56, 259), was represented in these accountings by petitioner Silbiger (R. 118) who was awarded an allowance of $40,000 (R. 31) for legal services which occupied his time on less than 100 days (R. 59).

The questions presented by petitioners are, in effect, whether the Circuit Court of Appeals erred in deciding that the allowance awarded to petitioner Silbiger is adequate compensation for his services.

When the Debtor petitioned for reorganization in June, 1934, it had outstanding eighteen Series of First Mortgage-Collateral Bonds, each secured by a separate Trust Fund under a Trust Agreement made by the Debtor to a Bank as Trustee (R. 91). Eleven banks were Trustees under these Trust Agreements, one of which was President and Directors of the Manhattan Company (hereinafter called "Bank of Manhattan"), Trustee of the Fifth and Ninth Series bonds (R. 91).

Charles H. Kelby and Clifford S. Kelsey were duly appointed and qualified as the reorganization Trustees of the Debtor and acted as such until July 31, 1944, when Charles H. Kelby died (R. 173). Mr. Kelsey is still acting as Trustee (R. 173).

In the course of the proceeding the Debtor was found to be insolvent (R. 91). Thereafter, in January, 1938, a General Plan of Reorganization and a separate Plan for each Series of bonds were duly confirmed; the bankruptcy court reserving jurisdiction to carry out the Plans (R. 91-92).*

The General Plan provided in part for the formation of a new corporation to be wholly owned by the bondholders; the separate Series Plans for a modified or Supplemental Trust Agreement (R. 92).

Following confirmation, and as a part of the proceedings to carry out the Plans, the bankruptcy court approved the appointment of one of the Corporate Trustees of the Debtor's Series of bonds as the Successor Trustee for all Series, approved the form of the Supplemental Trust Agreement to be executed between the New Corporation and the new Corporate Trustee, and directed each of the Corporate Trustees under the original Trust Agreements to transfer and deliver the Trust Fund collateral to the Successor Trustee, and to account in the reorganization proceeding for its acts as Trustee (R. 92).

The old Corporate Trustees accordingly filed their accounts and respectively petitioned the court for a judicial settlement thereof (R. 92-93).

The jurisdiction of the bankruptcy court over the accounts in all eighteen Series was upheld in *Central Hanover Bank* v. *President and Directors of the Manhattan Co.*, 105 F. 2d 130, wherein the Circuit Court of Appeals

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* Petitioner Silbiger had a minor role in the proceeding up to the time the Plans were confirmed, and on a previous appeal the Circuit Court of Appeals found that $3,000 was adequate compensation for his services in that respect (*In re Prudence-Bonds Corporation*, 122 F. 2d 258, 264).

held that the liability of the old Corporate Trustees for any diversion or waste of the Trust Funds was to "restore the *res*"; that recoveries on objections to the accounts would go back into the Trust Funds or *res*; and that the liability of the old Corporate Trustees, as well as the right and remedy to compel restoration of the *res*, constituted property of the Debtor within the meaning of the Bankruptcy Act.

Upon the mandate of the Circuit Court of Appeals in that case, the bankruptcy court decreed that "to make effective, consummate and carry out" the confirmed Plans, it had and thereby took exclusive jurisdiction over the accounts and all objections thereto (R. 115). This decree further provided that any objections of the New Corporation or the reorganization Trustees of the Debtor would be deemed to be made on their own behalf and on behalf of the bondholders, and authorized bondholders to join in and adopt such objections (R. 115).

Objections to the accounts were duly filed and the accounts and objections in all Series were referred to a Special Master for trial (R. 117-118).

There then ensued further litigation in the proceeding which is described in two opinions of the Circuit Court of Appeals reported as *Manufacturers Trust Co.* v. *Kelby*, 125 F. 2d 650, cert. denied, 316 U. S. 697, and *Brooklyn Trust Co.* v. *Kelby*, 134 F. 2d 105, cert. denied, 319 U. S. 767. In the *Manufacturers Trust Co.* case, the Circuit Court of Appeals affirmed an order of the bankruptcy court decreeing, among other things, that the objections to the accounts were not barred by any Statute of Limitations, and that the New Corporation, the reorganization Trustees, and individual bondholders were proper parties in the accountings. In the *Brooklyn Trust Co.* case, the Circuit Court of Appeals restated the reasons for its decision in the *Central Hanover* case, *supra*, and held, among other things, that the liability of the Corporate Trustees to restore the *res* was as much a part of the Trust Fund

collateral securing the bonds as any other part, and constituted property in the legal custody of the bankruptcy court.

Among the accounts of the Corporate Trustees were those of the Bank of Manhattan, as Trustee of the Debtor's Fifth and Ninth Series bonds (R. 93). These accounts, together with the Bank's petition for the judicial settlement thereof, were filed in September, 1938 (R. 93). After an extensive investigation of the facts by counsel and accountants for the New Corporation, by the reorganization Trustees and their counsel and by counsel for Reconstruction Finance Corporation (hereinafter called "RFC"), an intervenor in the proceeding (R. 283), objections to the Fifth and Ninth Series accounts were filed on October 2, 1939, by the New Corporation and the reorganization Trustees (R. 96-97, 116-118).

The objections, which charged that the Bank, as Trustee, had released large sums of cash and other Trust Fund securities to the Debtor in violation of the express provisions of the Trust Agreements, comprised a total of 58 pages and consisted of eleven separately stated objections to a total of 197 specific transactions of the Bank over a period from October, 1926 to January, 1933 (R. 118).

Objections in both the Fifth and Ninth Series were filed on the same date by bondholders represented by Joseph Nemerov, Esq., and in the Fifth Series only by petitioner Eddy, holder of a $1000 Fifth Series bond (R. 118-119). The objections of petitioner Eddy were of a general character, only three pages in length and merely joined in and adopted a portion of the objections of the New Corporation and the reorganization Trustees (R. 118).

The objections of the New Corporation and the reorganization Trustees specifically prayed that the Bank be surcharged "with interest" from "the respective dates of the credits and items objected to". The separate objections prepared by petitioner Silbiger, who claims sole credit for the recovery of interest on the surcharges, did

not pray for any such relief (S. M. 443-446; *President and Directors of the Manhattan Co.* v. *Kelby,* 147 F. 2d 465, record on appeal, Fifth Series, pp. 95, 122, Ninth Series, pp. 80-81 *).

The Fifth and Ninth Series objections were tried before the Special Master in the period from November, 1942 to June, 1943, the trial occupying, aside from adjournments, nine full days and three half days of hearings before the Master (R. 131-132). The stenographer's minutes of the trial, including testimony of seven witnesses, totaled approximately 715 pages, and 100 exhibits, including ten voluminous stipulations of fact, were introduced in evidence (R. 132-134). On June 1, 1943, after the Objectors had rested their case, petitioner Silbiger, on behalf of petitioner Eddy, moved for leave to join in the objections of the New Corporation and the reorganization Trustees in the Ninth Series (R. 119).

At the trial, petitioner Silbiger did not contend, either orally or in a brief, that the Bank should be charged with interest on the surcharges (S. M. 442), whereas, the New Corporation and the reorganization Trustees specifically claimed interest on the releases of cash and securities objected to from the respective dates thereof to the date of the decree (S. M. 446-447).

The Special Master recommended that certain of the objections be sustained with surcharges against the Bank of Manhattan of $1,065,565 in the Fifth Series and $136,998.99 in the Ninth Series (R. 136). Exceptions to the Master's Reports were duly filed by the Bank, by petitioner Eddy, and jointly by the New Corporation, the reorganization Trustees and the bondholders represented by Mr. Nemerov

* The stenographer's minutes and records on appeal to which reference is made were part of the record in the case before the Circuit Court of Appeals (R. 451), but as we show in Point II, *infra*, the petitioners have filed only a part of the record with this Court. Because of this, it is necessary here and in other places in this brief to refer to the original papers, including stenographer's minutes, on which the appeal was heard.

(R. 136-137). All of the Objectors to the Bank's accounts excepted to the Master's failure to recommend that interest be allowed on the surcharges (147 F. 2d 465, record on appeal, Fifth Series, pp. 611, 614, Ninth Series, pp. 533, 537).

The District Court Judge confirmed the Master's Reports, overruled all exceptions thereto and awarded judgments against the Bank in favor of the New Corporation for the benefit of the Fifth and Ninth Series Trust Funds (R. 139-140; 147 F. 2d 465, record on appeal, Fifth Series, p. 15, Ninth Series, p. 15).

Appeals were taken by all of the parties in so far as their respective exceptions to the Master's Reports were overruled (R. 140-141; 147 F. 2d 465, record on appeal, Fifth Series, pp. 5-11, Ninth Series, pp. 5-11). The Circuit Court of Appeals modified and affirmed as modified the decrees of the District Court by increasing the surcharges by a total of $12,808.34, and by holding that interest should have been allowed on the surcharges at a rate to be fixed in the discretion of the trial Judge (R. 145; *President and Directors of the Manhattan Co.* v. *Kelby*, 147 F. 2d 465). A petition of the Bank for a writ of certiorari was denied (324 U. S. 866). Thereafter, proceedings were had in the District Court to fix the rate of interest and the rate was fixed at 3% and final judgments were entered against the Bank (R. 147-148).

The sums recovered, including interest on the judgments, amounted to $1,572,991.73 in the Fifth Series and $208,132.16 in the Ninth Series (R. 149).

Proceedings were then had to fix allowances for services and expenses solely in connection with these Fifth and Ninth Series accountings. Applications for allowances were filed (R. 244-245) and objections to certain of the applications were interposed by the New Corporation (R. 243), RFC (R. 283), Bank of Manhattan (R. 277) and by various individual bondholders holding upwards of $400,000 principal amount of Fifth and Ninth Series bonds (R. 271, 273, 285; S. M. 113-115).

The applications and objections were referred to a Special Master who held hearings on 17 days at which almost 2,000 pages of testimony was taken and many exhibits introduced in evidence (R. 69). The Master's Report (R. 34) was confirmed by the District Court Judge who has been in charge of the reorganization proceeding since its inception (R. 30-31, 68).

The allowances requested and awarded are as set forth in the opinion of the Circuit Court of Appeals (R. 461) and not as stated by petitioners at page 6 of the petition.

The petitioners appealed to the Circuit Court of Appeals on the ground that the allowance of $40,000 awarded to petitioner Silbiger was inadequate. They also appealed from the allowances to the Kelby Estate, Mr. Wildermuth and Mr. McCarty. They did not, however, contend that the sums awarded these other parties were excessive or that no allowances should have been awarded to them. On the contrary, as the Circuit Court of Appeals stated, "the aggregate amount which Silbiger said would be reasonable compensation for the other parties was far more than the $145,000 which the Estate of Kelby, McCarty, Nemerov and Wildermuth were allowed in the aggregate. He made no objection to the larger sums asked for and his appeals from the awards to them must be because they were granted sums relatively disproportionate to those which he received" (R. 464-465).

The Circuit Court of Appeals by a divided court (Judge Frank dissenting) found that the allowance of $40,000 was adequate compensation for the services of petitioner Silbiger (R. 460). The Court unanimously held that the other allowances appealed from were fair and reasonable (R. 460).

The services for which petitioner Silbiger was awarded this allowance occupied his time on less than 100 days (R. 59). He did not discover or uncover any of the objections which resulted in obtaining the recoveries from the Bank of Manhattan in the Fifth and Ninth Series (R.

96-109). The Circuit Court of Appeals found, "the basis for the claims of restitution by the trustees of the various series of bonds were primarily unearthed and chiefly developed by the accountants and counsel for the New Corporation" (R. 463). Petitioner Silbiger, in fact, did not appear in the accountings until almost three months after the New Corporation and its counsel had disclosed the nature of the objections (R. 96-109).

The general form of objections prepared by petitioner Silbiger merely adopted and then only in part the objections of the New Corporation and the reorganization Trustees (R. 118). Petitioner Silbiger made no investigations of fact and he testified he prepared his objections from material available to him in the record on appeal in the *Central Hanover* case, *supra* (S. M. 580); material which had been prepared by counsel for the New Corporation. As he said, "I did not know what each account would disclose (although the accounts were available for his examination in the office of the Clerk of the Court), and so, my objections were drawn in general form" (S. M. 581).

Petitioner Silbiger, moreover, did not participate in the proceedings in the District Court on the question of jurisdiction involved in the *Central Hanover* case, *supra* (R. 97-109). He filed a brief on the appeal, but, as the majority of the Circuit Court of Appeals said, "it would be extravagant to say that in the Central Hanover appeal his brief in any sense won the day" (R. 463). He also did not participate in any way in the important proceedings in the District Court in the *Brooklyn Trust Co.* case, *supra*, wherein two of the Banks attempted by a fictitious state court suit to defeat the jurisdiction of the bankruptcy court (Silbiger Ex. 1, New Corporation, Ex. 1, S. M. 201, 338-349). He filed a brief on the appeal in that case, but his brief did not discuss the facts and cited only three of the forty-five cases cited in the opinion of the Circuit Court of Appeals in the case and the three cases he cited were among the cases cited in the opinion of the District Court Judge (134 F. 2d 105).

Furthermore, petitioner Silbiger, as the Circuit Court of Appeals found, did not prepare the objections in the Fifth and Ninth Series cases for trial and he did not try the cases before the Special Master (R. 463). In fact, between July 2, 1942, the date the Master set the cases down for trial, and September 21, 1943, the date the Master's Reports were filed, petitioner Silbiger's services consisted in spending 3 days and 9 half days in attending the trial and approximately 34 hours in attending some conferences and adjournments; a total of approximately 12½ days in a period of 15 months (S. M. 220-294). He asked a few questions of a real estate appraiser who was called as a witness for the Bank (S. M. 456-460), but all the testimony of real estate appraisers for the Bank was stricken out on motion of counsel for the New Corporation (147 F. 2d 465, record on appeal, Fifth Series, pp. 239-244, 277-278, 282-283). The only other thing he did at the trial was to prove his client Eddy was a bondholder (R. 460). During the trial he did not have a copy of the accounts (S. M. 272), or of most of the exhibits (S. M. 285), or of the minutes of the trial (S. M. 286). Nor did he prepare any of the stipulations of fact (R. 133-135). He testified he never had "any occasion" to examine the books and records of the Bank of Manhattan or of the Debtor, although they were available to him (S. M. 362-363). He testified he accepted the facts in the stipulations of fact in reliance upon counsel and the accountants for the New Corporation (S. M. 363). He conceded his briefs in the District Court did not discuss the facts (S. M. 301-303), but he testified he considered the facts important (S. M. 301-302) and that his "omission of any discussion of the facts" was "activated" because "I assumed that whatever discussion of the facts was necessary would have been taken care of by the briefs of other counsel" (S. M. 305). He conceded the cases "were presented by Judge Kelby and Mr. McCarty" (S. M. 220), who he said were eminent and competent counsel respectively (S. M. 464, 465, 466, 468, 511). He said whatever skill was required at the trial was

exercised by Judge Kelby and Mr. McCarty (S. M. 494-495); he conceded they had the burden of trying the cases (S. M. 495), and he said he had no criticism of their services (S. M. 519). The majority of the Circuit Court of Appeals said, "the chief burden in preparing for trial the claims against the Manhattan Company as trustee of the bonds of the Fifth and Ninth Series, and in conducting the trial, was borne by McCarty and Judge Kelby. The same thing was done in *Manufacturers Trust Co.* v. *Kelby,* 125 F. 2d 650, and *Brooklyn Trust Co.* v. *Kelby,* 134 F. 2d 105" (R. 463).

In the period of eighteen months between September 21, 1943, the date the Special Master's Reports were filed, and May 16, 1945, the date the judgments against the Bank were paid, petitioner Silbiger, according to his own testimony and diary entries, devoted only approximately 56 to 61 days to the Fifth and Ninth Series cases (S. M. 294-336, 431-434). He testified he could not say "when, if at all", he examined any facts between September 21, 1943 and January 21, 1944, the date he filed his brief with the District Court Judge (S. M. 304, 306). He said "I did not discuss the facts. I assumed the facts established by the Special Master's Report, and I felt my province was to point out the principles applicable to those facts" (S. M. 305); this notwithstanding that the Bank's exceptions to the Master's Reports included approximately 80 separate exceptions relating to findings of fact (S. M. 303; 147 F. 2d 465, record on appeal, Fifth Series, pp. 576-608, Ninth Series, pp. 508-530).

Petitioner Silbiger, furthermore, did not make the principal argument in the Fifth and Ninth Series cases before the District Court Judge (R. 137). He did not attend to the preparation of the records on appeal in the cases (R. 141-142), and he did not participate in the argument of the appeals (S. M. 327).

Summary of Argument

The order sought to be reviewed affirms an order awarding allowances in a bankruptcy reorganization proceeding. The questions presented relate to the adequacy of the allowance awarded to petitioner Silbiger, and do not involve any special or important question of law meriting a review by this Court.

In the Circuit Court of Appeals, the appeal was heard upon the original papers pursuant to the provisions of Section 250 of the Bankruptcy Act which provides that appeals from orders on allowances in corporate reorganization proceedings "shall be summarily heard upon the original papers". The petitioners have not lodged the original papers with the Clerk of this Court and they have not served or filed the record in the case as required by Rule XXXVIII of the rules of this Court.

I

The petition for certiorari does not present any special or important question of law meriting a review by this Court.

The substance of the questions presented and errors specified by the petitioners is whether the Circuit Court of Appeals erred in deciding that the allowance awarded to petitioner Silbiger is adequate.

This issue raises no unsettled or novel question of federal or local law and no conflict of decisions is involved. A Special Master, the District Court Judge in charge of the reorganization since its inception, and the majority of the Circuit Court of Appeals have determined that the allowance is adequate.

The principle is well established that allowances in bankruptcy reorganizations will be disturbed on appeal

only upon a clear showing of an abuse of discretion (*Dickinson Industrial Site, Inc.* v. *Cowin,* 309 U. S. 382; *In re Mt. Forest Fur Farms of America, Inc.,* 157 F. 2d 640; *Stein* v. *Hemker,* 157 F. 2d 740; *London* v. *Snyder,* 163 F. 2d 621; *In re Realty Associates Sec. Corp.,* 156 F. 2d 480; *Newman* v. *Ambassador Apartments,* 101 F. 2d 308; *Sullivan & Cromwell* v. *Colorado Fuel & Iron Co.,* 96 F. 2d 219; *In re Herz, Inc.,* 81 F. 2d 511; *Calhoun* v. *Stratton,* 61 F. 2d 302). The abuse of discretion, indeed, must be so clear as to indicate a manifest "disregard of right and reason" (*In re Mt. Forest Fur Farms of America, Inc., Stein* v. *Hemker, London* v. *Snyder, supra*).

No abuse of discretion has been shown by petitioners, or we submit, could be shown in a case where, as here, the allowances awarded have been found to be adequate and reasonable by a majority of the Circuit Court of Appeals. The fact that one Judge dissented in part serves to emphasize that no clear showing of abuse of discretion could be made.*

The petitioners' specification of errors Nos. "1" and "2" are that the Circuit Court of Appeals erred in denying to petitioner Silbiger sole credit for the recovery of approximately $483,000 interest on the surcharges against the Bank of Manhattan. The basis of this contention is that counsel for the other Objectors to the Bank's accounts failed to claim interest by a separate point in their brief on the appeal, and that Rule XIX of the rules of the Cir-

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* Petitioners' statement (petition, p. 7) that the dissenting Judge, who wrote the opinions of the Circuit Court of Appeals in the *Brooklyn Trust Co.* and *Bank of Manhattan* cases, *supra,* "was undoubtedly best qualified to evaluate the services of the respective counsel in the important phases of the litigation in the Circuit Court" is not supported by the facts. The majority of the Court participated in three of the four appeals in the litigation, including two in which the dissenting Judge did not participate. Judge A. N. Hand, who wrote the majority opinion, sat in the *Central Hanover* and *Brooklyn Trust Co.* cases, *supra,* and Judge Chase, who concurred in the majority opinion, sat in the *Manufacturers Trust Co.* case, *supra.* The dissenting Judge did not participate in either the *Central Hanover* or *Manufacturers Trust Co.* cases.

cuit Court of Appeals requires that a brief contain a concise statement of the errors claimed.

Clearly, this contention does not raise any unsettled or novel question of law. The power of the Circuit Court of Appeals to modify or disregard its rules or excuse strict compliance therewith to the end that a case may be reviewed on the merits in the interests of justice cannot be doubted. Whether an error assigned is waived by failure to specify it in a brief in accordance with a rule of court or whether such a waiver should be overlooked are matters which may best be decided by the appellate court in which the brief is filed (Cf. *Maryland Casualty Co.* v. *Jones*, 279 U. S. 792; same case, 35 F. 2d 791; *Arnold* v. *Horrigan*, 238 Fed. 39). Rule X of the rules of the Circuit Court of Appeals in effect in 1944, when the appeal in the *Bank of Manhattan* case, *supra*, was heard, specifically provided that "the court, at its option, may notice a plain error not assigned". Rule XXVII (6) of the rules of this Court likewise so provides.

In any event, the majority of the Circuit Court of Appeals determined that on the appeal the other Objectors to the Bank's accounts "preserved their rights" in respect of the question of interest, and further that the sums recovered as interest resulted from the services of counsel for the other Objectors, as well as the services of petitioner Silbiger (R. 463-464). This determination is fully supported by the record. Petitioner Silbiger's separate point in his brief in the Circuit Court of Appeals on the question of interest "covered about one-half a page and but a single paragraph to the bare assertion without analysis" (R. 61). And as the Special Master pointed out, his "contention was not wholly sustained by the court" (R. 61). Moreover, as we have shown in our statement of facts, petitioner Silbiger did not discover the objections which resulted in the surcharges on which interest was allowed. He did not pray for a recovery of interest in the objections he filed, nor did he claim interest at the

trial before the Special Master. The objections of the New Corporation and the reorganization Trustees, however, specifically prayed for interest on the surcharges; these parties specifically claimed interest at the trial, and they, together with the bondholders represented by Mr. Nemerov, excepted to the Master's failure to allow interest and appealed from the decision of the District Court overruling that exception. In addition, the recovery of interest was not obtained until after certiorari was denied and after proceedings in the District Court to fix the rate of interest. Counsel for the other Objectors filed a brief in opposition to the Bank's petition for certiorari and they, together with counsel for RFC, participated in the further proceedings in the District Court, examined law and prepared a brief on the question with the ultimate result that the rate of interest was fixed at 3% (R. 146-148). The majority of the Circuit Court of Appeals stated (R. 463-464):

> "* * * The contention that interest should be allowed on the claims had been presented before the Master and the District Judge by the New Corporation, the trustees for the debtor and Mr. Nemerov, but after it was overruled and they appealed from that decision, they did not press the point relating to interest as a separate one and cite authorities—as did Silbiger. He is entitled to consideration because of this, although the other parties seem to have preserved their rights. On the other hand, it does not appear that Silbiger pressed the matter before the Master.
>
> The foundation for an award of interest was laid by all parties and the 3% finally allowed seems to have been the result of the contentions of McCarty, Wildermuth, Nemerov and Dealy, as well as of Silbiger, after the decision of this Court in *President and Directors of the Manhattan Co.* v. *Kelby*, 147 F. 2d 465, 479, that some interest should be allowed. In any event, the special service of Silbiger in insisting at all times upon an award of interest, though important, neither consumed much time nor introduced novel argument, and his claim to receive $105,000 therefor was all out of proportion to his deserts in the premises."

Petitioners' specification of errors Nos. "3" and "4" are that the bondholders were the real parties in interest in the accountings; that the reorganization Trustees and the New Corporation had no standing in the proceedings; and that, therefore, the allowance awarded to petitioner Silbiger is discriminatory because it is disportionately small as compared with other allowances.

The petitioners do not contend, and did not contend below, that no allowances should have been awarded to the Kelby Estate, Mr. Wildermuth or Mr. McCarty. Their position in the District Court was that the allowances to these other parties, together with an allowance to Mr. Nemerov, should not exceed $190,000; a sum "far more", as the Circuit Court of Appeals said, "than the $145,000 which the Estate of Kelby, McCarty, Nemerov and Wildermuth were allowed in the aggregate" (R. 464-465). Petitioners, therefore, are in no way aggrieved by the other allowances awarded.

Compensation allowed others in the same proceeding affords little or no evidence of the reasonableness or unreasonableness of an allowance under review (*London* v. *Snyder, supra; Chlupsa* v. *Posvic,* 113 F. 2d 375). In any event, the record clearly shows that the services of these other counsel were in the aggregate much more extensive, time consuming and valuable than the services of petitioner Silbiger.

The petitioners' contention that the reorganization Trustees and the New Corporation had no standing in the proceeding is without merit. Petitioners, in fact, heretofore attempted unsuccessfully to raise such contention in this Court in petitioning for writs of certiorari to review two orders of the Circuit Court of Appeals denying them leave to appeal and dismissing an appeal they attempted to take as a matter of right from a prior order of the reorganization court awarding allowances in connection with accountings in Series of bonds, other than the Fifth and Ninth here involved (*Eddy & Silbiger* v. *Kelby,* 319 U. S. 755).

The reorganization Trustees were appointed by the bankruptcy court Judge (R. 173); they became vested with title to all property of the Debtor; and in the *Central Hanover* case, *supra,* jurisdiction over the accountings was upheld on the ground that the liability of the Corporate Trustees to restore the Trust Funds constituted property of the Debtor within the meaning of the Bankruptcy Act. In fact, in his brief on the appeal in that case, petitioner Silbiger contended that "Title to the Claims of the Bondholders predicated on the Mismanagement and Improper Diversion of the Trust Funds or *Res,* Vested in the Debtor's Trustees as Assets of This Estate and a Right of Action Accrued to Such Trustees to Enforce Such Claims and Recover the Diverted Funds or Their Equivalent for Proper Distribution Among the Creditors Entitled to Share Therein" (*Eddy & Silbiger* v. *Kelby, supra,* record on appeal, p. 91). The reorganization Trustees, furthermore, were served with the accounts by direction of the bankruptcy court Judge (R. 175); they were authorized to do all things necessary to carry out the confirmed Plans (*Central Hanover* case, *supra,* record on appeal, pp. 143, 144, 161-162), and they were specifically requested by the bankruptcy court Judge to take an active part in the accountings which were had to carry out the Plans (R. 115, 462; *Brooklyn Trust Co.* v. *Kelby, supra,* at p. 111).

The New Corporation is wholly owned by the bondholders; the liability of the Corporate Trustees constituted part of the Trust Fund collateral just as much "as any other part" (*Brooklyn Trust Co.* v. *Kelby, supra,* at p. 111), and the Supplemental Trust Agreement made by the New Corporation to the new Corporate Trustee to secure the bonds, as modified by the Plans, specifically provides in Article III, that the New Corporation has full power and authority to "demand, receive, sue for and recover all moneys and other properties and rights forming part of the Collateral" (R. 95). Petitioners, in contending that the New Corporation is merely a servicing agent, have overlooked the fact that the Supplemental Trust Agreement

defines the terms "to service the Collateral or servicing the Collateral, or words of similar import" to mean "the exercise of all and singular the powers set forth in Article III hereof", which include, in addition to those above mentioned, the power to sell "all or any part of the Collateral for such consideration as in the judgment of the Corporation shall be fair and proper" (New Corporation, Ex. 3, pp. 5-6, 16-19; S. M. 573-574). Indeed, the sums recovered from the Bank of Manhattan were obtained on final judgments entered in favor of the New Corporation (R. 148).

Moreover, in *Manufacturers Trust Co.* v. *Kelby, supra,* the Circuit Court of Appeals affirmed an order of the bankruptcy court decreeing that the New Corporation and the reorganization Trustees were proper parties in the accountings. And in that case petitioner Silbiger joined in the appellees' brief in which it was contended that the New Corporation and the reorganization Trustees were proper parties.

The fifth error specified by the petitioners is that the Circuit Court of Appeals "arbitrarily" disregarded the testimony of an expert witness as to the value of petitioner Silbiger's services.

The expert testified on cross-examination that he had no personal knowledge of the facts, that he had not read or examined any of many papers, briefs and records on appeal in the litigation (S. M. 1454-1488). He admitted that he "did not know all of the work that was done or how it was done", or "by whom it was done", that he did not know "all of the steps taken and the proceedings had", and that he was "not familiar with the amount of time and labor involved by all counsel in this case" (S. M. 1948-1949). And he admitted also that many facts and circumstances which are established by the record would cause him to feel that petitioner Silbiger's services "were not all that I thought they were" and "would reduce", "detract from", "change", have a "material effect" upon, make a "difference", and a "great deal of difference" in his opinion (S. M. 1514, 1540, 1573, 1634, 1654, 1657-1659, 1700, 1745, 1755, 1763).

The opinions of experts are advisory only, and the federal courts have many times pointed out that they are themselves experts on the value of legal services; experts whose duty it is "to protect trust estates from 'vicarious generosity' in the matter of attorneys' fees" (*Blackhurst* v. *Johnson*, 72 F. 2d 644, 648); experts who must carefully protect the "rights of those who ultimately pay" (*Newton* v. *Consolidated Gas Co.*, 259 U. S. 101, 105); experts who temper expert opinion with their "own calm judgment based upon the amount and kind of labor involved" (*In re Associated Towel & Linen Supply Co.*, 7 F. Supp. 699, 701; *Tracy* v. *Spitzer-Rorick Trust & Savings Bank*, 12 F. 2d 755; *Federal Oil Marketing Corp.* v. *Cravens*, 46 F. 2d 938; *Columbian Nat. Life Ins. Co.* v. *Keyes*, 138 F. 2d 382; *McDougal* v. *Black Panther Oil & Gas Co.*, 277 Fed. 701; *Central Trust Co.* v. *Wabash, St. L. & P. Ry. Co.*, 32 Fed. 185).

The expert testimony was received and considered by the Special Master and the District Court Judge (R. 63-64) and there is no basis for petitioner's contention that it was "arbitrarily" disregarded in the Courts below. As petitioner Silbiger himself said in contending that the Special Master should take the expert testimony, "It does not mean that because an expert comes before the Court and says that the services are worth so much and so much money, that that is binding upon the Court. The Court will itself determine from its own experience in these matters and so will the Special Master" (S. M. 132).

The sixth and last of petitioners' specification of errors is that the Circuit Court of Appeals erred in deciding that the allowance awarded to petitioner Silbiger is adequate.

The Federal Courts in bankruptcy cases have had occasion frequently to call attention to the admonition of this Court against "vicarious generosity" in the matter of allowances (*In re Gilbert*, 276 U. S. 294, 296; *Realty Associates Sec. Corp.* v. *O'Connor*, 295 U. S. 295; *Callaghan* v. *RFC*, 297 U. S. 464; *In re New York Investors, Inc.*,

79 F. 2d 182; *In re National Dept. Stores,* 11 F. Supp. 633; *In re Rothman,* 14 F. Supp. 241; *Baile* v. *Rossell,* 60 F. 2d 806). Economy of administration was a controlling reason for the enactment of Sec. 77B (*Callaghan* v. *RFC; Dickinson Industrial Site, Inc.* v. *Cowin, supra*); Chapter X set up even more comprehensive supervision over bankruptcy allowances (*Brown* v. *Gerdes,* 321 U. S. 178). And it has been emphasized that allowances of attorneys' fees in bankruptcy cases "cannot and should not approximate what attorneys might or should receive under similar circumstances for services to private clients" (*In re Owl Drug Co.,* 16 F. Supp. 139, 144, aff'd, *Cohn* v. *Edler,* 90 F. 2d 823; *In re Mt. Forest Fur Farms of America, Inc., supra*).

When the nature, character and limited extent of the services rendered by petitioner Silbiger are considered in the light of these principles it becomes manifest that no abuse of discretion is indicated by the allowance to him of the substantial sum of $40,000. Petitioner Silbiger, we submit, has been fully and, indeed, generously, compensated for his services.

II

The record in the case has not been served or filed as required by Rule XXXVIII of the rules of this Court.

Rule XXXVIII (1) of the Rules of this Court requires that a petition for review on writ of certiorari "shall be accompanied by a certified transcript of the record in the case, including the proceedings in the court to which the writ is asked to be directed". Subdivision "3" of the Rule provides that "Notice of the filing of the petition, together with a copy of the petition, printed record and supporting brief, shall be served on counsel for the respondent within ten days after the filing * * * and due proof of service shall be filed with the clerk".

The rule has not been complied with by the petitioners. The only papers filed in this Court by petitioners and served on counsel for the respondents are, (1) a notice of the filing of the petition for writ of certiorari, (2) the petition for certiorari and supporting brief, (3) a printed appendix to petitioners' brief in the Circuit Court of Appeals, (4) a printed copy of the opinion and order of the Circuit Court of Appeals, and (5) a certification by the Clerk of that Court.

The appeal to the Circuit Court of Appeals was required to be heard on the original papers pursuant to the provisions of Section 250 of the Bankruptcy Act. Accordingly, the original papers were lodged with the Clerk of the Circuit Court of Appeals pursuant to an order of the District Court Judge. The petitioners, however, printed some of the papers and a small portion of the testimony as an appendix to their brief, but a very substantial part of the record was not printed, nor was any printed record required, since Section 250 provides that appeals to the Circuit Court of Appeals from orders on allowances "shall be summarily heard upon the original papers". Section 250, however, does not provide for a review of allowance orders in this Court upon the original papers. Moreover, the original papers in the case have not been lodged with the Clerk of this Court.

The appendix to the petitioners' brief in the Circuit Court of Appeals does not, therefore, constitute the record in the case. This appendix, moreover, should not be treated as a sufficiently complete substitute for the record since it contains only a small part of the evidence material to the petitioners' specification of errors. The petitioners, for example, contend that the Circuit Court of Appeals erred in deciding that the award of $40,000 to petitioner Silbiger is adequate compensation for his services. The appendix, however, does not contain approximately 400 pages of petitioner Silbiger's own testimony on cross-examination as to the nature and extent of his services. The petitioners also contend that the Circuit Court of Appeals

"arbitrarily" disregarded the testimony of an expert witness as to value of petitioner Silbiger's services. The appendix contains the hypothetical question propounded to the expert and the expert's opinion of value in answer to such question, but does not contain approximately 450 of the 500 pages of the testimony of the expert on cross-examination. The appendix, furthermore, shows that the record in the case, as designated by the petitioners themselves, includes the records on appeal and briefs on five prior appeals to the Circuit Court of Appeals (R. 451).* But no part of these prior records on appeal and briefs, comprising a total of upwards of 3,500 printed pages, is included in the appendix or has been furnished to this Court, except in so far as the files of the Clerk contain the records on three of such appeals in respect of which certiorari was denied. In addition, the appendix does not contain any of the exhibits introduced in evidence at the hearings before the Special Master on the applications for allowances, although petitioners' brief (p. 21) refers to at least one of the exhibits. Indeed, petitioners' brief, although replete with purported statements of fact, contains only a single record reference to the appendix. Petitioners, for example, by a chart at page 14 of their brief attempt to convey the impression that petitioner Silbiger was the only attorney who participated and rendered services in all phases of the accountings in the reorganization proceeding. This chart is not supported by any record references and is not in accord with the facts. As we have shown in our statement of facts, *supra*, pp. 8-11, petitioner Silbiger did not participate at all in many important phases of the accountings and in other important phases he participated only in a minor degree.

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* *Central Hanover Bank* v. *President and Directors of the Manhattan Co.*, 105 F. 2d 130; *Manufacturers Trust Co.* v. *Kelby*, 125 F. 2d 650, cert. denied, 316 U. S. 697; *Brooklyn Trust Co.* v. *Kelby*, 134 F. 2d 105, cert. denied, 319 U. S. 767; *President and Directors of the Manhattan Co.* v. *Kelby*, 147 F. 2d 465, cert. denied, 324 U. S. 866; *Eddy* v. *Kelsy*, 148 F. 2d 323.

The petition for certiorari is, therefore, defective since the record in the case has not been served or filed and the time to do so has expired. Clearly, this Court cannot review the adequacy of the allowance awarded to petitioner Silbiger on an appendix record which does not contain a substantial part of the evidence. Nor can respondents' counsel brief their case with references to the pages of the record as required by Rules X(3) and XXVII(3) of the Rules of this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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November 14, 1947.